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# Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 183.

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UNION PACIFIC RAILROAD COMPANY,
*Defendant-Appellee, Petitioner,*

—against—

JAMES J. E. BURKE,
*Plaintiff-Appellant, Respondent.*

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## *BRIEF FOR PETITIONER.*

This is a writ of certiorari to review a submitted controversy decided by the State Courts of the State of New York.

The facts agreed upon in the submission are as follows: (Record, pp. 2-6.)

I. On March 10th, 1915, at Yokohama, Japan, the firm of S. Ontra & Brother (the Respondent's assignor), delivered to the Pacific Mail Steamship Company for transportation, certain property consisting of 56 cases of drawn work goods and Renaissance consigned to New York, New York, to be there delivered to the shippers' order, notify S. Ontra & Brother, 425 Broadway, New

York, and at the time and place of shipment the Pacific Mail Steamship Company delivered to S. Ontra & Brother, a bill of lading, which was duly accepted by the shipper and appears as Exhibit "A" (pp. 7-8).

II. The Pacific Mail Steamship Company duly transported the shipment to the Port of San Francisco, where it delivered it to the Southern Pacific Company, and the Southern Pacific Company thereupon transported the property to its point of junction with petitioner's line, at which place it delivered it to the petitioner, as the next carrier on the way to New York.

III. The whole shipment was totally destroyed by fire near Rawlins, Wyoming, while in the custody of the petitioner, as carrier, and the liability of the petitioner for the loss is not disputed; this controversy relates to the *amount* of the liability.

IV. The freight was to be collected at destination and the bill of lading (Exhibit A, p. 7) shows as collect freight the sum of $507.02, made up as follows: *Ocean freight* at the rate of 50 cents per hundred pounds based on the weight of the shipment of 26,404 pounds, or a total of $132.02, and *rail freight* at the rate of $1.25 per hundred pounds, based upon a minimum carload weight of 30,000 pounds, or a total of $375.00. The bill of lading also contained an agreement that the valuation of the shipment was $100.00 per package. This is the provision upon which the Petitioner bases its case (p. 8, clause 13).

V. The petitioner, the Southern Pacific Company and the other carriers involved had duly filed, in accordance with the Interstate Commerce Act, certain classifications, tariffs and schedules of rates (the mate-

rial part which appears as Exhibit B, pp. 9-20). The material provisions of the filed Tariffs were in substance as follows:

1. If the shipment was carried under the terms of the Uniform Bill of Lading (p. 17), the rates per 100 pounds were as follows (p. 21):

> Item 250, Linen Goods, not otherwise specified, and Sinaway, in packages, less than carloads, $1.60; carloads, $1.25.
>
> Item 255, Linen Goods, in packages of valuation of $900, or more, per 40 cubic feet, less than carloads, $4.00; carloads, (left blank).

The shipment was worth less than $900 per 40 cubic feet, and freight was computed under Item 250.

If the shipment was carried *not* under the terms of the Uniform Bill of Lading, the rate would be 10 per cent. higher (p. 13, Rule 9-D).

VI. The respondent claims upon the foregoing facts that he is entitled to recover judgment for $17,549.01, the invoice and actual value of the shipment, and the petitioner claims that the respondent is entitled to recover only $5,600, the value calculated on the basis of $100 per package.

VII. The Appellate Division of the Supreme Court of New York agreed with the Petitioner's view, and gave judgment for the respondent for the sum of $5,600. Its opinion is at p. 24 of the Record.

VIII. The Court of Appeals of New York reversed this decision, and gave judgment for $17,549.01. Its opinion is at p. 37 of the Record.

## POINT I.

**The value of the shipment was agreed upon between the shipper and the carrier. Such valuation is binding upon the parties unless it is made invalid by the Interstate Commerce Act.**

The bill of lading contained the following provision in paragraph 13: (See Record, pp. 7 and 8.)

> "It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100.00."

This provision, by the common law as administered in the Federal Courts and in the Courts of New York, constitutes a valid agreement and fixes the amount of recovery at not exceeding $100.00 per package.

> *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331.
> *Greenwald* v. *Barrett*, 199 N. Y. 170.

The bill of lading was a through bill of lading, and was intended to apply to all connecting carriers. The bill recited:

"from Yokohama via San Francisco to New York,"

and further recited:

"Received in apparent good order and condition, * * * from S. Ontra & Brother, to be transported by the Pacific Mail Steamship Company on board the steamship Persia, * * * from Yokohama unto the port of San Francisco, * * * and there upon the arrival of said steamer in like condition to be received by and delivered unto the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Western Pacific Railway Company, or any one of them, and thence to be transported by said Company and connecting railroad companies to New York, and there in like condition to be delivered unto * * * order."

The particular provision fixing the value of the goods —Section 13, above quoted—refers to the liability of "the Companies," and later "the Carriers."

This clearly makes out a case in which the petitioner is one of a line of connecting carriers, all of which are entitled to the benefit of the released valuation, and other provisions of the original bill of lading, even though they were not specifically named therein.

*R. R. Co.* v. *Androscoggin Mills*, 22 Wall. 594.

*Whitworth* v. *Erie Ruy. Co.*, 87 N. Y. 413.

*White* v. *Weir*, 33 A. D. 145.

*Woodruff* v. *Havemeyer*, 106 N. Y. 129, at p. 134.

## POINT II.

**At the time the shipment was made, agreed valuations had not been made illegal by the Interstate Commerce Act.**

In *Greenwald* v. *Barrett*, 199 N. Y. 170, the Court of Appeals said, at page 173:

> "The question to be determined upon this appeal is whether this Federal legislation forbids an express company from making a contract with a shipper such as we have quoted from the receipt given to the plaintiffs. If that question is answered in the affirmative, the plaintiffs were entitled to recover whatever they could prove to have been the actual value of the property shipped. If it is answered in the negative, their recovery must be limited to the agreed value of the property under the terms of the receipt. * * * The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods *or to agree with the shipper upon a valuation of the property carried.*"

This interpretation of the Act has been expressly approved by this Court, in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, at page 512, where this Court quoted the above passage, among others, with approval.

It is to be noted that the present shipment was made on March 10, 1915, some months before the coming into effect of the so-called Cummins Amendment, which specifically forbade the making of agreed valuations, except under certain restrictions. This Act was approved March 4, 1915, but came into effect June 2, 1915 (38 U. S. Statutes at Large, Part I, p. 1196, Chap. 176), some months after this shipment.

## POINT III.

**The validity of the valuation clause depends upon the Federal Common Law and the Interstate Commerce Act.**

The effect of the Carmack Amendment to the Interstate Commerce Act was to withdraw interstate commerce from the diverse operation of State laws, and subject it to a uniform Federal rule.

In the case of *New York Central R. R.* v. *Beaham*, 242 U. S. 148, this Court said at page 151:

> "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and *common law principles* accepted and enforced in federal courts."

And in *Southern Express Company* v. *Byers*, 240 U. S. 612, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and *common law principles* accepted and enforced by the federal courts."

## POINT IV.

**The filed tariffs provided for a valuation agreed upon between the shipper and the carrier.**

It is contended by the respondent that, as soon as the goods were loaded on cars at San Francisco, and

began their rail transit from San Francisco to New York, they became shipments in interstate commerce, and automatically became subject to the provisions of the filed tariffs and the Uniform Bill of Lading governing import shipments from San Francisco to New York, and that the rights and liabilities of the parties are, therefore, fixed by such tariffs, and this view has been upheld by the Appellate Division and the Court of Appeals. Assuming such to be the law, there is nothing in the tariffs that invalidates the agreed valuation.

The Western Classification, No. 53, specifically provides for the valuation of goods by agreement between the shipper and the carrier. The relevant provisions are as follows (p. 13):

> "Rule 9-A.—Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading,' 'Straight' or 'Order,' as shown on pages 87 to 90 inclusive."

The Uniform Bill of Lading provides in Section 3 as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper, or *has been agreed upon*, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." (Italics are ours.)

It is to be noted that this provision recognizes four alternative measures of value upon which damages may be based:

1. The invoice value (including prepaid freight).

2. A lower value represented by the shipper.

3. A lower value agreed upon.

4. A lower value determined by the classification or tariffs upon which the rate is based.

and provides that the first value (invoice) shall govern unless one of the other three exists, in which event such lower value shall be the maximum amount to govern the computation of damages.

In the present case values 2 or 4 did not exist; that is, there was no value lower than invoice represented in writing by the shipper or determined by the classification of interstate tariffs upon which the rate was based. There was, however, a value under clause 3; that is, a lower value had been agreed upon. If the respondent is right in his contention that the shipment must be regarded as being governed by the uniform bill of lading with the same force and effect as if such a bill of lading had been issued to cover the shipment, nevertheless, this forms no basis for repudiating the agreed valuation made at the only point in the entire transit at which the shipper and the carriers could possibly make any agreements as to the value. If the Court is to destroy the contract as actually made between the parties and substitute the statutory contract, it must, at least, carry into the statutory contract such provisions of the real contract as are consistent with the statutory contract. As is pointed out above, the contract of shipment is the "bill of lading plus the schedules and tariffs." Neither the tariff nor the uniform bill of lad-

ing states how the agreed valuation should be stated, but the natural method of expressing such an agreement is in the bill of lading, and this Court can probably take judicial notice of the fact that agreed valuations are usually stated in the bill of lading, either in the printed clauses or by an endorsement by rubber stamp or in handwriting.

To express the petitioner's position more briefly: *The uniform bill of lading provides that damages shall be based on the invoice value, unless a lower value has been agreed upon, and in this case a value of* $100 *per package was agreed upon and stated in writing in its natural place, namely, the only bill of lading ever issued on the shipment.* Such valuation is therefore valid even if all the terms of the uniform bill of lading are read into the contract of carriage.

The Appellate Division decided the present case in Petitioner's favor on the above grounds (p. 28).

## POINT V.

**The fact that the tariffs did not have a special rate for shipments valued at $100 per package is immaterial.**

The Court of Appeals of New York, in its opinion in the present case, reversed the Appellate Division, and held that the agreed valuation was not valid and effective on the sole ground that the charge made for the inland transportation was not based specifically upon the agreed valuation of $100 per package (p. 45).

It is submitted that this decision is contrary to the decision of this Court in

*Reid* v. *American Express*, 241 U. S. 544.

*That case, it is submitted, is an express adjudication that, by the law as administered in the Federal Courts, an agreed valuation is valid and binding, regardless of whether or not the freight rate is based on the valuation agreed upon.*

The case of *Reid* v. *Fargo* involved an automobile, shipped from England to the United States, under a bill of láding which contained a clause fixing its value at $100. The shippers proved affirmatively that the carrier's rates on automobiles were based on measurement (that is, so much per 40 cubic feet), and that, if the actual value of the automobile had been declared, the rate would have been the same. Although the bill of lading recited that, where a higher value was declared, "extra freight as may be agreed upon," was to be paid, it was proved affirmatively that no such extra freight rate actually existed and that no extra freight would have been demanded by the Carrier.

In sustaining the valuation the Circuit Court of Appeals for the Second Circuit said:

> "Similar stipulations are held binding in this Court. *George N. Pierce Co.* v. *Wells Fargo Co.*, 189 Fed. 561, 110 C. C. A. 645. But the proctors for the express company contend that, as the freight on the car was calculated on measurement and not on value, this stipulation does not apply. Freight rates on a package and the amount an owner may recover in case of loss are two entirely different things. The parties may agree that for a higher freight the package shall be valued for purposes of recovery at over $100. In this case they have agreed that the value of the car is $100, and that must be taken to be its true value for the purposes of the contract of carriage. Of course, the stipulation would not

> apply if the car had been charged l an *ad valorem* freight on a value over that amoun nt. But in this case the freight was charged on m neasurement."

On certiorari this Court sustained the limitation without discussion (241 U. S. 544), alth hough reversing the decree as to other parties.

If, therefore, the present case is to be decided on the principles of the Common Law, as admi inistered in the Federal Courts, *Reid* v. *Fargo,* is decisi ive of the question, and the Court of Appeals of New York erred in holding the case inapplicable. The fact t that *Reid* v. *Fargo* was an admiralty case affords no ground for distinction between the two cases.

*Reid* v. *American Express Co.* has b been cited, and followed in *Kuhnhold* v. *Compagnie Gene eral Transatlantique,* 251 Fed. 389, where Judge Mayer, in the District Court for the Southern District of New York, in construing a bill of lading provision in a Fr rench Line bill of lading, similar to the present one, said l:

> "The language is simple and clear. It is entirely within the power of the shipper to declare value, and, in such event, in n case of loss, the intrinsic value at the loading p port is allowed. If the shipper, however, fails to declare value, and thus leaves the carrier entirely y in the dark, in that regard, the shipper is fully y informed by the bill of lading what the maxim mum allowance for loss will be, with the reservati ion to the carrier at its option to make good eith her at so much per measurement or so much per w weight; the assumption being, of course, that th he carrier will choose the lesser figure."
>
> Since *Hart* v. *Pennsylvania R R. R. Co.,* 112 U. S. 331, limited liability clauses h have been held good, if these clauses amount to an agreement and are reasonable."

The opinion of the Court of Appeals is based entirely upon *dicta* in this Court, which so far as they are in point at all, are overruled by *Reid* v. *American Express.*

The cases cited by the New York Court of Appeals are the following:

The case of *Hart* v. *Pennsylvania R. R. Co.,* 112 U. S. 331, involved a shipment of live stock under a bill of lading containing an agreed valuation clause. There was no evidence one way or the other as to whether the rate of freight was based on the valuation. The Court assumed that the rate was so based, and held the agreed valuation clause valid. The case is not authority, however, for the contention that without a rate of freight based on the valuation the agreed valuation is invalid. At most, *Hart* v. *Pennsylvania R. R. Co.* rises no higher than dictum on this point.

*American Express Co.* v. *U. S. Horse Shoe Co.,* 244 U. S. 58, was a suit against the plaintiff in error for failure to deliver a colt delivered to it for transportation. The express receipt fixed a primary value of $50 each for colts. No other value was written in by the shipper and the rate charged was based on the $50 value. The Court held the limitation of liability was valid, basing its decision on an estoppel against the shipper.

The case of *Pierce Co.* v. *Wells Fargo & Co.,* 236 U. S. 278, involved a shipment of automobiles by express from Buffalo to San Francisco, the express receipt stating that the value of the goods were limited to $50, unless a greater value was declared, which had not been done. It is true that two freight rates were offered the

shipper, but the fact that the Court held the stipulation valid is again not a decision that it would have been *invalid* if there had been but one rate.

The case of *Kansas City Southern Railroad Co.* v. *Carl*, 227 U. S. 639, involved a shipment of household goods, in which the shipper signed an owner's released valuation clause limiting liability for loss or damage to $5 per hundred weight, in consideration of which he received a lower freight rate; and the clause was held valid.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, a case involving the shipment of a diamond ring by express, the receipt contained a stipulation limiting the valuation to $50, unless a greater value was declared. The Court held the stipulation valid and used the following language:

> "It has therefore become an established rule of the common law as declared by this Court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

This rule is not, however, authority for the *converse* rule, that if the agreed value is made for some other purpose it is *invalid*.

*Chicago, Rock Island & Pacific Ry. Co.* v. *Cramer*, 232 U. S. 490, is to the same effect. This case involved a shipment of a carload of hogs, whose value the shipper represented to be $10 per head, in order to secure a lower rate of freight. The Court held the valuation binding.

*Western Transit Co.* v. *A. C. Leslie & Co., Ltd.*, 242 U. S. 448, held that the released valuation clause in an interstate bill of lading when based upon a difference in freight rates was valid.

*Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389, concerned a contract between shipper and carrier, where the valuation was limited to $5 per 100 pounds, in consideration of a lower rate of freight, and again the stipulation was held valid.

*D'Utassy* v. *Barrett*, 219 N. Y. 420, held that an agreed valuation by shipper and carrier concluded the shipper even where the loss was due to theft by the carrier's own servants.

*Moore* v. *Duncan*, 237 Fed. 780, was a case involving a shipment of pig iron, in which the shipper paid a freight rate based on a released valuation of $100, and the released valuation clause was held valid, the Court again basing its decision on the basis of estoppel against the shipper.

The case of *Boston & Maine R. R. Co.* v. *Piper*, 246 U. S. 439, was a case which decided that a stipulation in a contract for the shipment of live stock, limiting the carrier's liability, in case of unusual delay and detention, to the amount actually spent by the shipper in the purchase of food and water for his stock, was invalid, because it was a stipulation exonerating the carrier from losses due to his own negligence.

*Cincinnati, New Orleans & Texas Pac. Ry. Co.* v. *Rankin*, 241 U. S. 319, involved a shipment of mules, in which the bill of lading stipulated that the value should not exceed $75 per animal, and that for every

increase in value of 100 per cent. or fraction thereof, the tariff should be increased 50 per cent. The Court held the stipulation valid, and at page 327 said *obiter*:

> "The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

The statement is only dictum, however, and *in no case where a choice of rates has not been made to appear, has it been decided that the agreed valuation clause was invalid.*

The cases cited by the Court of Appeals, a summary of which is given above, do not sustain the proposition in support of which they are cited. They are all cases in which there was a choice of rates and the agreed valuation clause was held valid; but dicta from them are used to support a holding that an agreed valuation clause is invalid, *unless* a choice of rates has been offered the shipper, an obvious *non sequitur*.

## *POINT VI.*

***The judgment entered on the remittitur of the Court of Appeals should be reversed and the judgment of the Appellate Division reinstated.***

October Term, 1920.

Respectfully submitted,

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